No. 90-1593

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

PARAMOUNT PICTURES CORPORATION; COLUMBIA PICTURES INDUSTRIES, INC.; TRI-STAR PICTURES, INC.; TWENTIETH CENTURY FOX FILM CORPORATION; UNIVERSAL FILM EXCHANGES, INC; MGA/UA DISTRIBUTION COMPANY; ORION PICTURES DISTRIBUTION CORPORATION; ORION CLASSICS, a division of Orion Pictures Corporation; and BUENA VISTA DISTRIBUTION CO., INC.,
Petitioners,

vs.

THE MOVIE 1 & 2, a general partnership,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondent respectfully suggests that the Court of Appeals' decision raises no questions that merit certiorari review.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

Respondent respectfully suggests that this Court should deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit in *The Movie 1 & 2 v. United Artists,* (9th Cir. 1990) 909 F.2d 1245, *amended* (July 25, 1990) *rehearing denied* (March 14, 1991), reversing 681 F.Supp. 654 (N.D. Cal. 1987).

STATEMENT OF THE CASE

Procedural Background. Respondent, plaintiff below, Movie 1 & 2, filed its complaint on June 13, 1986, which was amended on March 9, 1987 and which alleged violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. 1, 2) for which treble damages were sought pursuant to Section 4 of the Clayton Act (15 U.S.C. 15). The plaintiff alleged that defendants United Artists Communications, Inc. ("United Artists") and The Nickelodeon Corporation ("Nickelodeon"), participated in an illegal agreement to divide movie products, a so-called "split", in the Santa Cruz market which plaintiff's new movie theatre threatened. Plaintiff further alleged that in order to protect this horizontal product division, these two exhibitor defendants engaged the distributor defendants, petitioners here, in a group boycott aimed at the plaintiff.[1] The complaint also charged the two exhibitor defendants, United Artists and Nickelodeon, with an attempt to monopolize, conspiracy to monopolize, and monopolization of the Santa Cruz exhibition market for first-run movies. E.R., 1-18.[2]

At the conclusion of discovery, the defendants moved for summary judgment, arguing that there was no triable issue of fact as to an antitrust violation. On December 22, 1987, the district court filed an opinion and order granting summary judgment and dismissing the cases. 681 F.Supp. 654.

The Court of Appeals rendered its decision and opinion on May 14, 1990, which opinion was amended on July 25, 1990; rehearing and hearing en banc were denied on March 14, 1991. 909 F.2d 1245.

The Record Before the Court of Appeals. The plaintiff is a movie exhibitor in Santa Cruz, California, a small community on

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[1] United Artists, an exhibitor-defendant, was not included in this Petition. Nickelodeon, the other exhibitor defendant, settled this case with the plaintiff and was dismissed from this action.

[2] The following citations to the record are used in this brief: "C.R." refers to the Clerk's Record; "E.R." refers to the Excerpts of the Record.

California's North Coast. Plaintiff owns a single movie theatre with two screens, which opened in 1984. Plaintiff intended to establish itself in both the first-run "commercial film" market and in the first-run "art film" market in Santa Cruz.

Plaintiff gradually discovered, however, that nearly all first-run films, whether commercial or art, went to two competitors who already controlled both markets in the Santa Cruz area. Plaintiff presented evidence that, during the relevant time period, it was able to obtain only 20 first-run film licenses out of approximately 400 that were awarded in the Santa Cruz market. C.R. 212, Ex. F-L; C.R. 225, p. 8.

The major exhibitors in the Santa Cruz market are defendants United Artists and Nickelodeon. United Artists operates five theatres with a total of 12 screens in Santa Cruz, showing mainly commercial "first run" films. United Artists' theatres collected approximately 96.9% of the gross revenues from first-run commercial films and 20% of the gross revenues from first-run art films in the Santa Cruz market. United Artists also operates approximately 3,000 screens throughout the United States; it is the second largest film exhibitor in the nation.

Defendant Nickelodeon operates two theatres in Santa Cruz, with a total of five screens. Nickelodeon's theatres exhibit primarily first-run and vintage art films, and collect approximately 69.9% of the gross revenues from first-run art films in the Santa Cruz market. The only other film exhibitors in the Santa Cruz market are two non-defendant exhibitors who show primarily subsequent-run films, and one drive-in theatre. C.R. 225, pp. 8-9.

Plaintiff presented evidence that United Artists and Nickelodeon agreed to "split" the market in Santa Cruz so that United Artists' 12 screens would exhibit first-run commercial films and Nickelodeon's five screens would exhibit first-run art films. Plaintiff also presented evidence that United Artists and Nickelodeon supported this split agreement by engaging the distributor defendants in a group boycott of the plaintiff's theatre. The purpose of these agreements was to eliminate plaintiff as a competitor in the Santa Cruz market.

The record before the Court of Appeals included both direct and circumstantial evidence of these agreements. There was direct evidence that one distributor-defendant's managing agent for the Santa Cruz area, Al Chiarrapotti, told plaintiff's owners in early 1984 that he did not need to bother counting seats in Santa Cruz because there was "a split of product down there. I don't have to count down there." 909 F.2d at 1249; C.R. 213, Ex. A. The meaning of this statement is that there was no need to count seats in theatres in order to calculate the potential yield from competing bids for licensing of films because the split agreement *prevented* competing bids.

There was also direct evidence from the owner of defendant Nickelodeon, William Raney, that in the 1970's there was a split agreement between United Artists and another Santa Cruz exhibitor at the time, Kindair. Raney did not remember whether he joined the split agreement at that time, but he acknowledged getting help from United Artists to get films. When asked why he contacted his competitor to get films from the distributors, Raney answered, "Well, why don't we just say it was to work magic, that when I had problems getting films sometimes Mr. Lencioni [United Artists' film buyer] could work some magic and I would get some films." C.R. 213, Ex. H.

Later, United Artists acquired Kindair, its competitor and partner in the earlier split agreement. C.R. 182, 5; 183, Ex. 4; 212, 3, 4; 8-14; 213, Ex. A, H; 225, p. 4-14, 23; E.R. 183, 185, 189. This left the Santa Cruz market with only United Artists, Nickelodeon, one drive-in, and one other independent cinema (exhibiting mostly subsequent-run films), until plaintiff's arrival into the market in 1984.

Following is a summary of the additional evidence of the agreements contained in the record:

(1) there was evidence that the plaintiff submitted "arguably superior" bids on first-run films to the defendant distributors, none of which bids was accepted, 909 F.2d at 1251;

(2) there was evidence that United Artists and Nickelodeon advertised films while the distributor was still considering

competing bids from plaintiff for the same film, raising the permissible inference that these exhibitor defendants knew in advance that they would receive the license, *id.*, at 1252;

(3) there was evidence that the distributor defendants awarded films to United Artists and Nickelodeon without any bids being made, or entered into negotiations with those two exhibitors that excluded plaintiff, *id.*;

(4) there was evidence that the exhibitor defendants were "tipped" about what the minimum requirements were for the award of a license, to the detriment of the plaintiff, *id.*;

(5) there was evidence of adjustments to licensing agreements that were made in favor of United Artists repeatedly, but to plaintiff rarely, *id.;*

(6) there was no evidence that, during the relevant period, United Artists and Nickelodeon had ever bid against each other on any films, *id.;*

(7) there was evidence that out of approximately 400 firstrun film licenses awarded during the relevant period, only 20 went to the plaintiff, C.R. 212, Ex. F-L; C.R. 225, p. 8; and

(8) there was evidence that certain distributors had refused to accept bids from the plaintiff, until the attorney for the plaintiff threatened legal action, *id.*, at 1251.

Consequently, there was sufficient direct evidence of both the split agreement between United Artists and Nickelodeon and the group boycott by these two defendants and the distributor defendants.

The Court of Appeals' Opinion. The Court of Appeals' opinion, that is the basis of this Petition, resulted from a *de novo* review[3] of the district court's grant of summary judgment in favor of all defendants.

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[3] Petitioners do not challenge the standard of appellate review applied by the Ninth Circuit panel.

Contrary to the impression that petitioners seek to create in their Petition, the Ninth Circuit opinion in this case applied the principles enunciated in both *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) and *Monsanto v. Spray-Rite Corp.*, 465 U.S. 752 (1984). The Ninth Circuit opinion, prior to reviewing the evidence that it relied upon in order to reverse the grant of summary judgment, quoted a legal standard that is clearly derived from *Matsushita* and *Monsanto:*

> The defendants in this case did offer some evidence from which a trier of fact could reasonably have found that their refusal to deal with The Movie was based on legitimate and sound business judgment. Following such a showing . . . a plaintiff must provide specific factual support for its allegations of conspiracy *which tends to show that the defendant was not acting independently*. Accordingly, we examine appellant's evidence in support of its conspiracy allegations.

909 F.2d, at 1251 (emphasis added).

Applying this standard, the Ninth Circuit discussed the evidence showing that the distributor defendants had received superior bids from plaintiff and yet rejected them in favor of bids from United Artist and Nickelodeon. The opinion identifies specific bids that were "arguably superior." *Id.* at 1251.

Next, the opinion notes that there was evidence that "these distributors had refused to even receive bids from The Movie until they received threatening correspondence from The Movie's attorney." *Id.* The court noted that the distributor defendants had not and could not cite a justification for this refusal. Especially in the non-competitive Santa Cruz market, the court concluded that such a refusal "to even receive a new exhibitor's bids 'tends to exclude the possibility of independent action.'" 909 F.2d at 1251. Although the court did not ascribe this quotation, it is taken almost verbatim from *Monsanto*, 465 U.S. at 764, and from *Matsushita*, 475 U.S. at 588.

Finally, the court pointed to the other evidence of action by the distributor defendants, including the award of films to United Artists and Nickelodeon without bids, bid negotiations that

excluded plaintiff, bid-tipping, adjustments to licensing agreements made regularly in favor of United Artists but rarely in favor of plaintiff, and the statistics about the award of first-run movie licenses in the relevant market. 909 F.2d at 1252; C.R. 212, Ex. F-L; C.R. 225, p.8.

Based on this evidence, nearly all of which was inconsistent with individual activity, the Ninth Circuit concluded that plaintiff had presented evidence that was adequate to support the conspiracy claim against the distributor defendants. 909 F.2d at 1252. The opinion does not in any manner question, let alone repudiate or purport to alter, this Court's decisions in *Monsanto* and *Matsushita*. Nor is it in conflict with the decisions of any other circuit.

Contrary to the argument in the Petition at pp. 14-17, this Ninth Circuit opinion did not hold that the *per se* rule should apply to group boycotts even though the purpose of the boycott is not itself *per se* illegal. In the current case, the purpose of the group boycott was to help the defendant exhibitors eliminate a competitor from a market that was already highly concentrated. That conduct is *per se* illegal, and this opinion therefore had no need to address the legal issue that the Petition discusses at 14-17. The Ninth Circuit's opinion is in complete agreement with the Seventh Circuit opinions discussed in the Petition.

SUMMARY OF THE ARGUMENT

The opinion of the Ninth Circuit in this case does not present any question that justifies the granting of the Petition. First, the opinion below explains and adheres to the legal principles and standards enunciated in both *Monsanto* and *Matsushita*, as well as other relevant decisions of this Court.

The Ninth Circuit examined the record for, and found, evidence that the distributor defendants participated in the agreements, some of which evidence "tends to exclude" the possibility that defendants were acting independently: (1) distributor defendants rejected "arguably superior" bids by plaintiff in favor of bids by United Artists and Nickelodeon; (2) certain defendants refused even to accept bids from the

plaintiff until plaintiff's attorney sent out a letter that threatened legal action; (3) the distributor defendants awarded film licenses to United Artists and Nickelodeon without negotiations, or after negotiations that excluded plaintiff; (4) the exhibitor defendants were "tipped" as to the requirements for the award of certain film licenses; (5) license adjustments were made frequently in favor of United Artists, but rarely in favor of plaintiff; and (6) the statistics of film license awards, showing that plaintiff received only 20 licenses out of approximately 400 awarded during the relevant period. The record also contained evidence that the distributor defendants had purchased advertising for certain films, including the purchase of print advertising, prior to the actual award of the licenses.

Furthermore, the distributor defendants had an economic incentive to cooperate with United Artists and Nickelodeon: United Artists alone controlled 96.9% of the Santa Cruz market for first-run commercial films, and the two exhibitors together controlled 89.9% of the Santa Cruz market for first-run art films. In addition, United Artists controlled about 3,000 other screens throughout the United States. Such a degree of market power could easily be used to engage the cooperation of distributors in the Santa Cruz market.

As for the second issue that the Petition seeks to raise, the opinion below specifically states that the group boycott alleged was in support of a "split agreement" with the purpose of excluding plaintiff from the Santa Cruz market—an agreement that is *per se* illegal. Therefore, this opinion is in agreement with the Seventh Circuit opinions cited by petitioners, and does not present a conflict between the circuits. Petitioners' Question 2 is a fabricated issue, not presented by this record.

The Court of Appeals in this case was confronted with a district court opinion that had improperly excluded admissible evidence.[4] The district court had conducted a cursory survey of the factual record, failing to identify material evidence. The Ninth Circuit opinion in this case did nothing more than augment the record

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[4] The Petitioners do not challenge any of the evidentiary decisions contained in the Ninth Circuit opinion.

with improperly excluded evidence, correctly evaluate a substantial and fact-specific record, and find sufficient evidence that met all relevant tests established in the decisions of this Court. No question is presented worthy of review.

ARGUMENT

I

THE OPINION BELOW IS ENTIRELY CONSISTENT WITH THIS COURT'S MATSUSHITA OPINION

The Petition seeks to create the impression that the opinion of the Ninth Circuit in this case is contrary to the guidance that this Court provided in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) and *Monsanto v. Spray-Rite Corp.*, 465 U.S. 752 (1984). That is not accurate; there is no conflict between the decision below and the relevant opinions of this Court.

A. The Ninth Circuit Opinion Specifically Acknowledges Plaintiff's Need to Bring Forward Evidence that "Tends to Exclude" the Possibility of Independent Activity

The Ninth Circuit opinion below applies each of the analytical steps and evidentiary standards for summary judgment in antitrust conspiracy cases that are set forth in *Matsushita*.

Matsushita first notes that the moving party must carry the "initial burden under Federal Rule of Civil Procedure 56(c) of demonstrating the absence of a genuine issue of material fact," 475 U.S., at 585, n. 10, and then requires that the opposing party "must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury," *id.*, at 585-86.

Matsushita further specifies that this second step has two elements: the respondent must establish "that there was an injury to them resulting from the illegal conduct," *id.*, at 586, and that the issue of fact is "genuine," including the need to demonstrate the plausibility of the theory, *id.*, at 587. Finally, *Matsushita* establishes that a plaintiff seeking to establish a conspiracy under Sherman 1 "must present evidence 'that tends to exclude the

possibility' that the alleged conspirators acted independently." *Id.*, at 587-88.

The Ninth Circuit opinion below acknowledges these requirements in its discussion of the general legal principles that would guide its review of summary judgment in a case brought under Section 1 of the Sherman Act. 909 F.2d, at 1250-51. The court first recognized the "right of a trader . . . engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal," quoting *United States v. Colgate & Co.*, 250 U.S. 300 (1919). The court acknowledged that, in order to protect this right, heightened evidentiary standards applied:

> [O]nce a defendant rebuts the allegations of conspiracy with 'probative evidence supporting an alternative interpretation of a defendant's conduct,' the plaintiff must come forward with specific factual support of its conspiracy allegations to avoid summary judgment. [citations omitted]. . . . Following such a showing of a plausible and justifiable reason for a defendant's conduct, a plaintiff must provide *specific factual support* for its allegations of conspiracy which *tends to show that the defendant was not acting independently*. Accordingly, we examine appellant's evidence in support of its conspiracy allegations.

909 F.2d, at 1250-51 (emphasis added). This heightened legal standard, as stated by the Ninth Circuit, is clearly derived from *Matsushita*.

Furthermore, the court affirmed this heightened standard as part of its analysis of the evidence. In discussing the refusal of certain distributor defendants even to accept bids from plaintiff until threatened with legal action, the court also examined the highly concentrated market in Santa Cruz and concluded: "In such an environment, the distributors' refusal to even receive a new exhibitor's bids 'tends to exclude the possibility of independent action,' and at least raises an issue of fact as to their participation in the alleged boycott." 909 F.2d, at 1251.

In view of this very specific language, petitioners cannot argue that the Ninth Circuit ignored the standards set forth in *Matsushita*. Rather, the Court of Appeals in this case acknowledged the correct standards and, as shown below, correctly applied them to the record.

B. The Opinion Below Correctly Applied the Standards of Matsushita to the Substantial Record Before It

The Ninth Circuit's application of *Matsushita* in this case is further confirmed by the court's analysis of the substantial evidence in the record. The following discussion will identify all evidence that supported the existence of the agreements, and further identify the evidence that "tends to exclude" the possibility of independent action.

The Court of Appeals below cited six evidentiary bases for its determination that "the plaintiff did present ample evidence to rebut defendants' evidence of independent business decisions to support plaintiff's allegations of an illegal boycott." 909 F.2d, at 1251.

The first evidentiary basis was the group of bids that plaintiff made to the distributor defendants, some of which the Court of Appeals found to be "arguably superior" to the bids that United Artists and Nickelodeon made for the same films—yet the exhibitor defendants received the licenses in all of these situations. *Id.*, at 1251. For the distributor defendants to reject plaintiff's superior bids would be *an action not in the individual self-interest* of the distributor defendants, and this evidence thus tends to exclude the possibility that the distributor defendants were acting independently.

Nor was it necessary that the Court of Appeals determine that these bids were *unquestionably* superior. *Matsushita* does not require that the plaintiff's evidence exclude the possibility of independent auction as a *matter of law*, but only that the evidence "tend to exclude" that possibility. If *Matsushita* were read to require that the plaintiff's evidence of conspiracy be *entirely undisputed* evidence, then a district court would be able to deny a defendant's motion for summary judgment only if the same evidence would support a finding of summary judgment *in favor*

of plaintiff.Consequently, defendants would always prevail on summary judgment motions unless the plaintiff should prevail on a similar motion as a matter of law—effectively eliminating the role of the fact-finder in Sherman 1 conspiracy cases.

Because plaintiff was actually awarded 20 licenses for first-run films in Santa Cruz during the relevant period, the distributor defendants cannot argue that their rejection of plaintiff's superior bids was motivated by a general determination that his facilities were inappropriate—they were appropriate enough to be acceptable in 5% of the licenses awarded in Santa Cruz over the relevant period.

The second evidentiary basis cited by the Ninth Circuit was also evidence that was not consistent with independent action:

> There was evidence before the trial court indicating that these distributors had refused to even receive bids from The Movie until they received threatening correspondence from The Movie's attorney. The distributors have cited no legitimate business justification for a refusal to even receive an exhibitor's bid, nor can this court conceive of how such conduct could reflect sound business judgment. To the contrary, such behavior raises the inference that the distributors would not have licensed films to The Movie even if presented with consistent lucrative bids superior to those of the other exhibitors.

909 F.2d, at 1251.

The Ninth Circuit then noted the anticompetitive situation in the Santa Cruz market: United Artists alone took in "roughly 96.9% of all revenues from first-run commercial films shown in Santa Cruz. . . ." *Id.* The court could have also noted that Nickelodeon, combined with United Artists, took in 89.9% of the revenues from first-run art films in Santa Cruz.

The opinion then concludes that this evidence meets the standard set forth in *Matsushita:*

> In such an environment [referring to the anticompetitive situation in Santa Cruz], the

> distributors' refusal even to receive a new exhibitor's bids "tends to exclude the possibility of independent action," and at least raises an issue of fact as to their participation in the alleged boycott.

Id., at 1251.

The third item of evidentiary support cited by the Court of Appeals was that the distributors had awarded licenses for films to United Artists and Nickelodeon without the necessity of bids at all, or had awarded licenses after negotiations that excluded the plaintiff. *Id.*, at 1252. Again, this conduct tends to exclude the possibility of independent action because it is not in the individual self-interest of the distributor defendants.

In a market as highly concentrated as the one in Santa Cruz, the *mere presence* in the bidding competition of a willing competitor, such as plaintiff, could have a very significant impact on the willingness of United Artists to make more attractive offers for first-run commercial films and of Nickelodeon to make more attractive offers for first-run art films. Yet the distributor defendants inexplicably denied plaintiff the opportunity even to participate in a bidding process for these films. There is no possible business justification for these actions, and they thus "tend to exclude" the possibility of independent action.

The fourth item of evidentiary support was that the exhibitor defendants had been "tipped off" by the distributor defendants as to what the requirements for an award of a license for a picture would be, to the detriment of the plaintiff. Because genuine competition in bidding is in the economic selfinterest of the distributor defendants, those actions also "tend to exclude the possibility of independent conduct."

The fifth item of evidentiary support was adjustments to licensing agreements made in favor of United Artists regularly, but to plaintiff rarely. *Id.*, at 1252. This evidence of necessity involves a comparison of those few times that plaintiff received a first-run film license (20 out of approximately 400 awarded during the relevant period) with the treatment of United Artists in all of its licenses. Because the presence of plaintiff in the Santa Cruz market would be very beneficial to the distributor defendants *if*

they were acting entirely in their own economic self interest, there could be no possible business justification for the distributor defendants extending less beneficial contractual arrangements to plaintiff than to United Artists. This evidence, therefore, also tends to exclude the possibility of independent action.

The sixth and final item of evidentiary support cited by the Court of Appeals was the set of statistics about the actual award of film licenses in the Santa Cruz market. *Id.*, at 1252. As discussed above, the record indicated that, out of approximately 400 first-run film licenses awarded during the relevant time period, plaintiff received only 20. C.R. 212, Exs. F-L; C.R. 225, p. 8. This evidence itself supports an inference of conspiracy.

There is one other set of facts that supports the inference of boycott activity by the distributor defendants, although it was not specifically cited by the Court of Appeals on this issue. 909 F.2d, at 1252. The record contained evidence that both United Artists and Nickelodeon advertised films in the Santa Cruz market *before* the licenses for those films had actually been awarded and while plaintiff was still competing for the award of the same license. On at least one occasion, each defendant purchased print advertising, before the relevant license had been awarded. Such activities raise the presumable inference that United Artists and Nickelodeon knew in advance that they would obtain these films.

Therefore, the record before the Court of Appeals contained a variety of evidence that tended to exclude the possibility of independent action by the distributor defendants. That requirement of *Matsushita*, 475 U.S., at 587-88, was both acknowledged and fulfilled by the Court of Appeals in this case.

If the Court of Appeals failed to make an express finding that the conspiracy alleged in this case was "economically plausible," it is only because the plausibility was so obvious.

The obvious plausibility of the alleged conspiracy in this record comes from the fact that United Artists alone controlled nearly 97% of the market for first-run commercial films in Santa Cruz, while United Artists and Nickelodeon together controlled nearly 90% of the market for first-run art films in Santa Cruz. With such market power, it is quite "plausible" that the exhibitor defendants

could induce individual distributors not to deal with the plaintiff. United Artists was in an especially strong position to do so, since it also controls about 3,000 other movie screens across the United States.

Therefore, all requirements of *Matsushita* were met by the record and opinion in this case, and the Ninth Circuit's decision presents no issue worthy of review by this Court.

II

THE ALLEGED BOYCOTT WAS INTENDED TO FURTHER A PLAN THAT WAS *PER SE* ILLEGAL; THEREFORE, THIS CASE IS IN AGREEMENT WITH THE SEVENTH CIRCUIT CASES CITED BY PETITIONERS

Petitioners erroneously argue that the opinion below creates a conflict with group boycott cases decided by the Seventh Circuit. Petition at pp. 14-17. But that is a misrepresentation of the facts of this case.

The Ninth Circuit opinion in this case does not hold that group boycott activity is *per se* illegal even if the purpose of the boycott is not itself *per se* illegal. There is no such holding in this opinion, because plaintiff below expressly alleged that the intent of the alleged boycott was to exclude plaintiff from the already anticompetitive market in Santa Cruz. As that intended purpose was itself *per se* illegal, 909 F.2d, at 1253, this opinion is in complete agreement with the Seventh Circuit opinions cited by the Petition. The second "issue" set forth in the Petition is therefore a non-issue.

CONCLUSION

Petitioners are not asking this Court to resolve any pressing issues of law. Instead, they are merely asking this Court to review the Court of Appeals' assessment of the evidence and come to a different conclusion. This is not the proper function of certiorari review.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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